(6)

No. 95-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CATERPILLAR, INC.,

Petitioner,

v.

JAMES DAVID LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

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46 pp

QUESTIONS PRESENTED

1. May a federal court judgment be allowed to stand when there was no subject matter jurisdiction when the case was removed from state court over the plaintiff's timely objection, so long as there was complete diversity at the time of judgment?

2. Does failure to seek interlocutory review of an order denying remand to state court waive the right to object to the subject matter jurisdiction of the federal court at time of removal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **page:**

STATUTES AND RULES

United States Code and Legislative History

Federal Rules

Kentucky Revised Statutes

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BRIEF FOR RESPONDENT

The issues that the Court has granted certiorari to decide arise from a tension between the clear commands of the removal statutes and the Federal Rules of Civil Procedure that support respondent's position, and the superficially appealing notion that, when a case has been tried to judgment based on jurisdiction that developed after removal, the courts should find some way to avoid retrial. But the Judicial Code and Federal Rules forbid removal where diversity of citizenship becomes complete more than a year after the filing of the state court action, and require jurisdictional defects to produce a remand to state court so long as they are called to the district court's attention before judgment. Those provisions are not waivable by the courts or by the failure of a party to seek discretionary interlocutory apppeal, whether the basis is efficiency or supposed equitable consideration. And however desirable it may be to preserve the results of a trial over "technical" objections based on federal procedure and

jurisdiction, petitioner's approach would not only encourage, but indeed require, piecemeal appeals whenever removal is upheld over the plaintiff's objections.

STATUTES INVOLVED

28 U.S.C. § 1292(b) provides, in pertinent part, as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . ..

28 U.S.C. § 1446(b) provides, in pertinent part, as follows:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1447(c) provides, in pertinent part, as follows:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT

Respondent James David Lewis, an employee of Gene Wilson Enterprises, was injured driving a bulldozer that was manufactured and sold by petitioner Caterpillar, Inc., and overhauled, serviced and maintained by Whayne Supply Company. The injury occurred when a hose ruptured, spraying hydraulic fluids on parts of the machine and causing a fire. Respondent obtained workers compensation benefits that were paid by Liberty Mutual Insurance Group, his employer's insurer.

On June 22, 1989, respondent sued petitioner and Whayne Supply in Lawrence Circuit Court, Lawrence County, Kentucky. He alleged manufacture of a defective product creating unreasonable danger against petitioner, negligent maintenance against Whayne Supply, and inadequate warning and breach of warranty against both defendants. His complaint sought medical, economic, mental anguish, and punitive damages. While the case was pending in state court, Liberty Mutual intervened as a plaintiff to assert subrogation rights in plaintiff's recoveries. As permitted by Kentucky law, K.R.S. § 342.700, Liberty Mutual's complaint in interven-tion named both itself and respondent as plaintiffs.

Even though there was diversity of citizenship between petitioner (a Delaware corporation) and respondent (a Kentucky citizen), petitioner could not remove the case because Whayne Supply was also a Kentucky citizen. A removal no-

tice must usually be filed within thirty days of receipt of the initial pleading, but this limit does not apply if the case is not then removable. In that event, removal is required within thirty days of receipt of the "amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S. C. § 1446(b). However, if removal is based on diversity of citizenship, there is an outside deadline for removal of one year from the date of the commencement of the action. *Id.*

On June 21, 1990, the day before the one-year deadline, petitioner filed a notice of removal in the United States District Court for the Eastern District of Kentucky, based on diversity of citizenship under 28 U.S.C. § 1332. Petitioner did not claim that it had received any "pleading, motion, order or other paper" divesting Whayne Supply of its party status in the case, thereby creating complete diversity. Nor did it argue that respondent's complaint against Whayne Supply was anything but a genuine effort to recover damages from it, or specifically that the joinder of Whayne Supply was fraudulent or for the purpose of defeating diversity. Instead, it alleged that, on June 12, it had learned from Whayne Supply that it either had, or "had probably," settled with respondent. JA 35. Although petitioner could not point to any "paper" establishing this fact, it argued that Whayne Supply would undoubtedly be dismissed from the action pursuant to this settlement, and its counsel submitted an affidavit averring that he "expect[ed]" to receive a writing to that effect at some unspecified time in the future. JA 32, 35. Needless to say, given the date on which these papers were executed, this would have been after the one-year deadline for removal.

Within days of removal, respondent objected to removal and moved to remand the case to state court. JA 36-37, 44-46. Respondent argued that complete diversity was lacking in several respects. First, he contended that, although he had settled some of his claims against Whayne Supply, Liberty

Mutual had not settled its claim against Whayne, and accordingly that this Kentucky citizen was still a party to the action. Second, he observed that Liberty Mutual was involved in the case by virtue of having insured Gene Wilson Enterprises, another Kentucky citizen that was, in fact, eventually added to the case as a third party defendant, JA 2, and never dismissed through time of judgment. Third, he noted that despite the settlement, Caterpillar had not received any paper within the thirty days before it filed its notice of removal showing the elimination of Whayne Supply as a defendant, even with respect to respondent's original claim against it. Indeed, such a paper was not filed until August 2, 1990. JA 47. Finally, he pointed out that his settlement with Whayne Supply was only partial, because he did not (and would not) settle the part of his claims against Whayne Supply to which Liberty Mutual had a subrogation interest.[1]

By unpublished order, the district court rejected these arguments and refused to remand the case. It held that Gene Wilson Enterprises' citizenship was irrelevant, and that the absence of formal dismissal of Whayne Supply did not mean that it still had to be considered a defendant for diversity purposes. Without addressing either the issue of Liberty Mutual's claim against Whayne Supply, nor respondent's interest in that claim, the district court held that diversity was complete and hence that there was federal jurisdiction. JA 55. Because that ruling was not a final decision, no appeal was

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[1] He did not limit his settlement in this way collusively, for purposes of jurisdiction; nor did it leave respondent with no claims against Whayne Supply. Because the settlement was structured this way, Liberty Mutual could not take any of his settlement proceeds. His claim for subrogable damages remained, although it was Liberty Mutual that had the primary incentive to pursue it. He retained his own interest in the subrogable claim because, under K.R.S. § 342.700, he could still recover from Liberty Mutual's subrogation damages his reasonable attorney's fees for the case.

then available under 28 U.S.C. § 1291; nor did respondent seek discretionary review under 28 U.S.C. § 1292(b).

Discovery, which had begun while the case was in state court, JA 34, continued, and the parties submitted their first witness lists and pretrial conference papers in July 1991, about nine months after remand had been denied. In June 1993, some two years after that, and four years after the action had been commenced in state court, Liberty Mutual and Whayne Supply settled their controversy and Whayne Supply was dismissed from the case. This was almost three years after petitioner had filed for removal.

The case was heard by a seven member jury, JA 81, for six days in November 1993, JA 6-7, resulting in a unanimous verdict for petitioner. Respondent appealed to the United States Court of Appeals for the Sixth Circuit. He argued that the trial had been infected by several errors, including denial of discovery, denial of sanctions for discovery misconduct, exclusion of evidence, and failure to give required jury instructions.[2] On the removal issue, he argued that the question was whether diversity had existed at removal, and contended that it did not, for three reasons. First, Whayne Supply had remained a defendant to the subrogation claim filed on behalf of both himself and Liberty Mutual; second, under the settlement he himself retained a claim against Whayne Supply for subrogable benefits; and third, removal had been effected prematurely because of the absence of any paper altering the lack of complete diversity within a year of the commencement of the action.

[2] As shown by the appellate briefs below (copies are lodged with the Clerk), petitioner errs in stating, Br. 21, that respondent had no objections to the conduct of the federal court proceeding.

Petitioner defended the removal decision solely by arguing that there was jurisdiction at the time of removal. It disputed respondent's characterization of the facts, arguing that respondent's settlement with Whayne Supply was enough to warrant removal, even before papers were filed finalizing the settlement and dismissing that defendant. The bulk of its brief, however, like the bulk of respondent's brief, was devoted to the merits of the case.

The court of appeals reversed, agreeing that removal was improper. It held that Liberty Mutual's subrogation claim against Whayne Supply was sufficient to keep Whayne as a defendant in the case, thus destroying complete diversity and barring jurisdiction at the time of removal. JA 89-90. The court found it unnecessary to consider either respondent's arguments based on his own remaining claim against Whayne Supply or his various arguments on the merits.

Petitioner sought rehearing, presenting for the first time the issues on which this Court has granted certiorari. This petition was denied without comment.[3]

[3] Petitioner argues, Br. 13 n.4, that because respondent did not discuss, below or in opposition to certiorari, the issues on which certiorari has been granted, he may not brief them. We disagree, but if the Court is unwilling to hear such arguments, we urge that the petition be dismissed as improvidently granted because there would then remain nothing to litigate. Indeed, **petitioner's** failure to discuss these issues below before its petition for rehearing undercuts its own claim for review in this case, because raising a question in a petition for rehearing is generally insufficient to preserve the issue. *Hanson v. Denckla*, 357 U.S. 235, 243-244 (1958). Admittedly, because respondent, then represented only by Kentucky counsel, did not cite this omission in his Opposition, the point "may be deemed waived," Supreme Court Rule 15.2, but the Court may act on this point should it choose to do so.

SUMMARY OF ARGUMENT

1. Because there were Kentucky citizens on both the plaintiffs' side and the defendants' side of this case, both when it was filed in June 1989 and when it was removed to federal court in June 1990, there was no federal jurisdiction. Thus, as the court of appeals held, the district court erred when it refused to remand the case to state court. The case did not become removable until the Kentucky defendant was dismissed in June 1993, four years after the case was commenced and a few months before trial.

Longstanding precedent requires that federal removal statutes be construed narrowly to protect state courts from being divested of their authority, thus impinging on state sovereignty, without an express Congressional grant of authority for the removal. Under 28 U.S.C. § 1447(c), a case must be remanded whenever "it appears" that the district court lacks subject matter jurisdiction, so long as this fact "appears" at some time before judgment. And 28 U.S.C. § 1446(b) provides that, when there is no federal jurisdiction at the time of filing, a case may be removed based on diversity that develops during the course of the litigation only if that happens within one year or less from the date when the case began in state court. Petitioner's argument, that the creation of complete diversity four years after the beginning of the state court excuses the district court's erroneous ruling on the issue of remand, flies in the face of both provisions.

Petitioner rests its argument almost entirely on a single case, *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). *Grubbs* does not stand for the proposition that lack of diversity at the time of removal can be cured whenever diversity develops after the case was removed. In *Grubbs*, there was complete diversity when the case was filed but the case was not removed until the United States became a party. There was no objection from anybody at that time, particular-

ly the party that lost the judgment. Only after losing did one party attack the district court's jurisdiction to rule against it. At most the case stands for the proposition that, even if a case is improperly removed, if there is no objection to removal until after judgment, then the judgment's validity depends, not on the propriety of the removal, but rather on the existence of federal jurisdiction at time of judgment.

Surely this Court would not have overturned a hundred years of precedent requiring that there be jurisdiction both when the case is filed and when it is removed without saying so specifically. And, because *Grubbs* was decided 16 years before the 1988 amendments that established the one-year limit on removal based on diversity that develops during the litigation, *Grubbs* cannot be controlling here.

Petitioner argues that "judicial efficiency" forbids overturning a trial that was conducted under conditions of complete diversity, as well as that respondent was in no way harmed by the fact that trial was held in federal rather than state court. Neither argument is sound.

It is always burdensome to repeat a trial because of errors committed either during or before the trial occurred, but that is no more true in the removal context than it is in any other situation. If a defendant can avoid the explicit statutory ban on removal based on diversity developing more than a year after the case was filed, by removing before diversity develops, and hoping to hang onto the federal court until non-diverse parties can be eliminated, defendants will have an enormous incentive to attempt wrongful removals, and the statutory limitation will be rendered useless. Indeed, if the mere existence of jurisdiction suffices to cure a wrongful removal, then all of the various procedural requirements for removal will become unenforceable.

Finally, respondent would have enjoyed several advantages in state court that he was denied in federal court. Indeed, the reason why institutional defendants like petitioner and its amicus curiae are so concerned to protect the "right to removal" is precisely that they believe that their interests are better protected in federal court. They cannot have it both ways by saying that it made no difference to respondent.

2. Nor did respondent waive his objection to removal by not seeking permission to take an interlocutory appeal under 28 U.S.C. § 1292(b). Section 1447(c) sets forth the procedures that must be followed to object to removal, and Federal Rule of Civil Procedure 12(h) makes clear that jurisdictional defenses are not waived if they are made at any time in the district court. Respondent met both requirements, and petitioner's suggestion of additional procedural hurdles is properly addressed to Congress or to the Rules Committees.

Nor is petitioner's proposal sound. Section 1292(b) appeals are not designed to be routinely used whenever allegedly erroneous removal decisions are made. Not only does section 1292(b) have several requirements that will often not be met — and that were probably not met in this case — but a rule that failure to seek permission for such an interlocutory appeal waives jurisdictional objections would effectively force all unsuccessful opponents of removal to pursue such appeals. In their haste to protect the judgment here, petitioner and its amicus lose sight of "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

Section 1292(b) appeals are particularly burdensome to the judicial system (requiring preliminary evaluation by both the district court and the court of appeals before the appeal

can even be heard on the merits). Moreover, many such appeals will ultimately prove unnecessary because many cases "go away" before they reach final judgment. In the end, therefore, petitioner's proposal will actually add much more burden to the federal judiciary than would be saved by avoiding a few post-judgment appeals.

ARGUMENT

I. Both the Language of the Statute and the Underlying Policies of Federalism Forbid Lack of Jurisdiction at the Time of Removal From Being Cured by the Development of Complete Diversity After the Time Permitted by Congress.

The jurisdiction of the federal courts, whether of cases originally filed in the district courts or cases removed to federal court from state court, is governed by 28 U.S.C. §§ 1331 *et seq*. In this case, petitioner claims that there was complete diversity of citizenship between the parties, thus creating subject matter jurisdiction under 28 U.S.C. § 1332, and warranting removal under 28 U.S.C. § 1441, pursuant to the procedures set forth in 28 U.S.C. §§ 1446 and 1447.

As this Court has repeatedly held, the first obligation in a case of statutory construction is to examine the language of the statutes in question. Thus, in order to determine whether removal in this case was proper — and thus whether the trial court erred in reaching the merits by trial or otherwise — it is necessary to examine the language of sections 1441(a), 1446(b) and 1447(c), a task that the petitioner fails to undertake. Indeed, one can read the entire argument section of petitioner's opening brief without encountering either the actual text of these statutes or any discussion of their language, with the exception of section 1441(e), which petitioner acknowledges is not involved in this case.

Moreover, this Court has long adhered to a firm rule requiring "strict construction" of removal statutes, reflecting Congress' policy of carefully limiting the ability of state court defendants to impinge on state sovereignty by removing actions from state court:

> Not only does the language of the Act of 1887 [section 1441's precursor] evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'
>
> *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941), *quoting Healy v. Ratti*, 292 U.S. 263, 270 (1934).

Again, this fundamental canon of construction of the removal statutes goes unmentioned by petitioner.

Section 1441(a) provides that, unless "otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants . . . ." Section 1446(b) requires a notice of removal to be filed within thirty days of the defendant's receipt of a copy of the initial pleading setting forth the plaintiff's claim for relief. The second paragraph of that section provides that, "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant" of a later "amended pleading, motion, order or other paper" from which the case's removability "may first be ascertained . . . except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."

For over one hundred years, this Court has consistently held that, in order to warrant removal, there must be federal jurisdiction both at the time the state action is commenced and at the time of removal. *Gibson v. Bruce*, 108 U.S. 561 (1883). Subject to the well-pleaded complaint rule, the determination of removability is based, not on some abstract notion of what a case ought to be about, but rather on the initial state court pleading. *Pullman Co. v. Jenkins*, 305 U.S. 534, 538 (1939). There is an escape hatch for defendants if the initial pleading does not disclose removability, but a later paper served by the plaintiff shows removability, at which time the thirty day limit for seeking removal begins to run anew. *Great Northern R. Co. v. Alexander*, 246 U.S. 276, 280-281 (1918). However, even removal based on this exception must, in diversity cases, be effected within one year of the commencement of the state court action. Section 1446(b), second paragraph. Thus, if a case becomes removable by reason of complete diversity after that date, the case must nevertheless remain in state court.

In this case, the initial pleading showed that the action was not removable, because there was incomplete diversity. Petitioner later learned a fact — respondent's partial settlement with Whayne Supply — which petitioner thought made the case removable, and therefore it filed its removal petition within thirty days of learning this fact. On the hypothesis that the case was then removable, but had not been remo-

vable previously, the petition was timely under section 1446(b) because it was filed one day less than a year after the commencement of the state action. It is critical to note, however, as the petitioner now concedes in order to frame the question on which review has been granted, that the case was not in fact removable, because complete diversity did not exist at that time. To the contrary, the case did not become removable based on complete diversity until Whayne Supply was dismissed from the action, which occurred well after the one-year limit on removability.

Finally, section 1447(c) sets forth procedures that plaintiffs who object to removal must follow in order to enforce the right to a remand to state court, and specifies the time within which different removal defects must be acted upon (emphasis added):

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If **at any time** before final judgment **it appears** that the district court **lacks subject matter jurisdiction**, the case **shall** be remanded.

Under this language, procedural defects, such as failure to file within thirty days of receipt of the initial complaint, must be raised within a limited time period. Defects based on lack of subject matter jurisdiction must be acted on either if raised by motion, or if a perspicacious district judge recognizes the problem sua sponte. And, if a jurisdictional flaw "appears," whether by motion or sua sponte, remand is **mandatory**, so long as the defect comes to the district court's attention at any time before final judgment.

In this case, respondent sought remand within the thirty days allowed for motions based on procedural issues, even

though his objection went to jurisdiction. Although the district court rejected respondent's contention that complete diversity was lacking, the court of appeals reversed, holding that jurisdiction was lacking at the time of removal. As petitioner acknowledges, Br. 5, because the Court has denied certiorari regarding this part of the court of appeals' decision, it has become final. Accordingly, the law of the case is that the district court did not actually have jurisdiction when the case was removed from state court.

Respondent was entitled to appeal from that ruling, but not immediately. Under 28 U.S.C. § 1291, appeals may be taken only from final decisions, which a refusal to remand decidedly is not. *Chicago, Rock Is. & Pac. R. Co. v. Stude*, 346 U.S. 574, 578 (1954). Like other interlocutory rulings, denial of remand is merged with the final judgment, and may be raised once the final decision has been issued. *Id.*; *see also Gay v. Ruff*, 292 U.S. 25, 30 (1934).

In order to create an exception to this plain statutory rule, petitioner invokes this Court's decision in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), which established that, when removal has not been challenged until after judgment was entered, the judgment should not be overturned if there was jurisdiction at the time of trial as well as at the time of judgment. In *Grubbs*, GECC did not object when its case was removed to federal court, and first contended that removal was improper after judgment was entered against it. This Court held that, when no objection has been raised below to removal, "the issue . . . on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court," *id.* at 702, and where the posture of the case has changed after removal and the parties have not objected to jurisdiction, it suffices that jurisdiction existed "as of the date of judgment." *Id.* at 704. It would serve no purpose, the Court continued, to require

the judgment winner, who was dragged against his will but without objection from the judgment loser into federal court, to demonstrate the existence of jurisdiction with respect to virtually unrelated claims with which his own claims had been joined while the case was in state court.

There are, it may readily be seen, two crucial differences between this case and *Grubbs*. First, petitioner concedes, in the lengthy footnote 6 on pages 14-15 of its brief, that the removal in *Grubbs* was defective for procedural rather than jurisdictional reasons. That is, complete diversity was available from the outset of the case as a basis for removing the action between a New York corporation and a Texas resident. Although the New York corporation did not remove the case within the requisite thirty days, the United States was subsequently added as a defendant, and it timely removed the claim against it, citing section 1444 as authority for removal. Not only did none of the other parties object to removal, but they all proceeded to try their claims to judgment. However, as petitioner also concedes, the lawsuit could have been removed to federal court when it was filed. The Court held in *Grubbs* only that, where there was jurisdiction as between the original parties to the case at time of judgment, it mattered not that removal on the basis of the claims against the United States was improper, especially where those claims were virtually unrelated to the claims between the original parties that were tried to judgment by consent.

Here, by contrast, there was no proper basis for federal jurisdiction of this case when it began or when it was removed, and it can scarcely be denied that either respondent's claims or Liberty Mutual's subrogation claims against Whayne Supply were related to the claims against petitioner. *Grubbs* cannot, therefore, be invoked as precedent to support a retroactive validation of the removal of this case, in which there was no jurisdiction at the time of filing or removal.

Second, in *Grubbs* nobody had objected to removal, nobody moved to remand, and the lower court never noticed the jurisdictional issue sua sponte. The court never issued an erroneous jurisdictional ruling from which anybody could have appealed. And, with respect to the language of section 1447(c), there was no time at which it could be said that "it appear[ed]" in the district court that there was no jurisdiction. Thus, the language of the statute did not require there, as it does here, that the case be remanded to state court.[4]

This difference also points up a significant equitable distinction between the two cases. The jurisdictional objection here is not based on sour grapes — respondent promptly asked the district court to return the case to state court, and the case was tried in federal court over his objection. Although subject matter jurisdiction cannot be granted by consent of the parties, it would have been unfair in *Grubbs* to overturn a judgment based on an error that the litigant who was later disappointed by the outcome of the litigation never called to the district court's attention. Thus, in *Grubbs*, the Court was presented with the sorry spectacle of a litigant agreeing to proceed in federal court, and willingly taking advantage of the differences between federal and state procedures, and crying sour grapes only after it lost in federal court. By the same token, in both *Baggs v. Martin*, 179 U.S. 206 (1900), and *Mackay v. Uinta Development Co.*, 229 U.S. 173 (1913), on which *Grubbs* relied, parties who removed the case to federal court objected to removal only

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[4] In *Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826 (1989), on which petitioner also relies, the suit was originally filed in federal court, and a jurisdictional defect was ignored in both the district court and the appellate briefs. This Court held that, when the court of appeals noted at argument that a dispensable defendant was not diverse, it could invoke Rule 21, F.R.Civ.P., to dismiss that defendant and so preserve jurisdiction. *Newman-Green* does not involve removal and does not otherwise aid petitioner.

after losing a judgment on the merits, and this Court refused to overturn judgments at their request.

Similarly, in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), the majority made clear its discomfort with the fact that a judgment loser, who attacked jurisdiction on appeal, was the one responsible for removing the case to federal court in the first place. *Id.* at 16-17. It nonetheless felt compelled to remand because jurisdiction cannot be created by consent and because at no time, not even at the time of judgment, had there been a proper basis for federal jurisdiction. *Id.* at 16-18. The minority applied the doctrine of estoppel to bar the jurisdictional question from being raised. *Id.* at 20-21.

Petitioner reads *Finn* and *Grubbs* as establishing a broad rule that improper removal can be retroactively validated whenever jurisdiction later becomes appropriate. The fair reading of both cases, however, is that there is a narrow exception to the requirement of jurisdiction at the time of filing and removal, confined solely to the situation where there is **both** jurisdiction at time of judgment **and** express or implicit consent by the judgment loser to removal.

Indeed, adoption of petitioner's contention that removal may be retroactively validated by subsequent events would destroy the carefully crafted Congressional scheme governing both the procedure and timing of removal petitions and remand motions. Thus, for example, under section 1446(b), as amended in 1988, a case may not be removed based on newly established diversity jurisdiction more than one year after the action has been commenced in state court. In this case, the action was commenced in state court on June 22, 1989. Diversity was not complete on June 21, 1990, when the action was removed to federal court eleven months and twenty-nine days after the state court action was commenced, and did not become complete until June 1993 when Liberty

Mutual settled its subrogation claim with Whayne Supply and the latter was formally dismissed from the case. Had petitioner waited until June 1993 to remove this case to federal court, its petition would have been untimely.[5]

And yet, under petitioner's theory, an **improper** removal, undertaken the day before the right to remove expired, may subsequently be validated by developments that establish subject matter jurisdiction. Such a rule would fly in the face of the Congressional determination to limit the time in which jurisdictional changes may be used to effect removal, not to speak of encouraging state court defendants to remove cases improperly in the hope that subsequent developments, possibly coupled with erroneous district court rulings, could enable them to secure a federal court hearing to which they were not entitled.

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[5] Because, under part of the court of appeals' ruling that has become final, it was Liberty Mutual's subrogation claim in respondent's name that barred complete diversity, petitioner's insinuations that respondent deliberately manipulated the timing of the consumation of the settlement of his nonsubrogable claims with Whayne Supply is a complete red herring. Even if those claims against Whayne Supply had been dismissed in June 1990 instead of August 1990, diversity would still not have been complete until June 1993, long after the one-year deadline. In that regard, before the 1988 amendments, conversations about the intent to dismiss non-diverse defendants were held not to trigger the time to remove the remaining controversy. *Gottlieb v. Firestone Steel Prod. Co.*, 524 F. Supp. 1137, 1139 (E.D. Pa. 1981) (citing other cases on this point). This case does not present an occasion to decide whether this rule should change now that proponents of removal may be disadvantaged by the need to wait for the formal dismissal to be effected. *See Smith v. Bally's Holiday*, 843 F. Supp. 1451, 1454-1455 (N.D. Ga. 1994).

Petitioner's amicus curiae, a large group of product liability defendants, openly proclaim that this is their goal. Having obtained in the 1988 removal amendments a specific mechanism for dealing with fictitious defendants and a firm deadline for remand motions, while accepting a limit on the time within which post-commencement changes could become the basis for removal jurisdiction in diversity cases, they simply ask the Court to delete the part of the compromise that they do not like. They urge the Court to adopt a "bright line rule that **no** violation of the removal statute is a proper ground for setting aside the judgment of a federal court where the court has jurisdiction at the time judgment is entered." Br. 2, 5 (emphasis in original). It suffices to say, in response, that the rule that a defendant desirous of removal must follow certain procedures, and meet certain deadlines, is well within Congress' prerogative, and this Court is simply not authorized to strike out part of the legislation by making it unenforceable, on the theory, put so boldly by amicus, that these procedures are worthless "legal ritual." Br. 2.[6]

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[6] Petitioner's proposed rule also makes little sense in light of the 1988 amendment to section 1447(c), whereby procedural objections to removal must be raised within thirty days of removal. At least some procedural flaws in removal papers cannot be cured after the removal petition is filed. *E.g., Jackson v. Allen*, 132 U.S. 27 (1889); *Denton v. Wal-mart Stores*, 733 F. Supp. 340, 341 (M. D. Fla. 1990); *but see Kinney v. Columbia S&L Ass'n*, 191 U.S. 78, 83-84 (1903) (inadequate allegations may be supplemented). And yet under petitioner's approach, although Congress has given plaintiffs who oppose removal a much longer time (that is, until final judgment) to call jurisdictional defects to the Court's attention, and even though a jurisdictional defect is far more serious than a mere flaw in the formalities of seeking removal, the jurisdictional problem can be "cured" but the procedural flaw may not be.

Petitioner argues that affirmance "would toss into the trash heap six years of federal court proceedings," Br. 7, and that reversal is needed to avoid inefficiency in the allocation of judicial and litigation resources. *Id.* 8. Its concern is vastly overstated. Although it is true that, if the case is remanded to state court, there may be another trial, that does not mean that the parties' litigation efforts in federal court will have come entirely to naught. Their legal research and discovery efforts, not to speak of the trial transcripts, will be available for use in the state court proceedings, and presumably the case can now be brought to trial promptly or, possibly, settled.

Moreover, to the extent that a new trial is needed, that is the consequence of **any** reversal subsequent to trial. Any inefficiency that is involved may be laid squarely at the feet of petitioner, which made its own bed by removing the case prematurely, in anticipation of the eventual dismissal of Whayne Supply, but with knowledge that Whayne Supply had not yet been dismissed and that, if it waited even two more days to file, the notice of removal would be untimely.

Indeed, knowledge that improper removal may lead to the loss of an otherwise valid judgment is needed to discourage defendants like petitioner from filing premature petitions for removal. If this Court eliminates that disincentive, defendants will have every reason to remove to federal court, in the hope that some subsequent developments, such as the eventual dismissal of nondiverse defendants, will permit that case to be kept in federal court and thus immunize an initial erroneous removal ruling from challenge on appeal.

Petitioner also suggests, Br. 7, 21, that respondent was in no way prejudiced by removal to federal court. Aside from its irrelevance, this assertion is simply not correct. There are numerous practical differences between proceedings in the Kentucky state courts and federal court, each of

which made it less advantageous for respondent to be in federal court, and which, indeed, provide the reason why respondent objected to removal and moved to remand the case to state court.

First, if the case had proceeded to trial in state court, the jury pool would have been confined to the rural county where respondent lives and where the accident occurred, instead of being drawn from the entire division of the federal district in which the case proceeded in federal court. The jury would thus not have included the professionals who sat on the federal court jury and, who, respondent believes, were less sympathetic to his case than a local jury would have been. Moreover, in federal court, a unanimous jury verdict is required, while in state court a plaintiff can prevail by a majority of 9-3, *see* K.R.S. § 29A.280, which respondent would have preferred.

There is also a major difference between the federal and state rules of evidence. At trial, respondent sought to show that, after the bulldozer at issue here was manufactured, changes were made to the design that caused respondent's injuries, to bolster his contention that the machine was defective. Such evidence is allowed by Kentucky law, *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), but the circuits disagree whether Rule 407 of the Federal Rules of Evidence bars evidence of subequent remedial measures in product liability as well as in negligence cases. *Compare Burke v. Deere & Co.*, 6 F.3d 497, 506 (8th Cir. 1993) *with Grenada Steel Indus. v. Alabama Oxygen Co.*, 695 F.2d 883, 886-888 (5th Cir. 1983). Pursuant to the general rule that the Federal Rules govern the admissibility of evidence in diversity cases, *e.g.*, *id.*, 665 F.2d at 885; *McInnis v. AMF*, 765 F.2d 240, 244-245 (1st Cir. 1985), the district judge followed Sixth Circuit precedent that Rule 407 does apply. *Hall v. American S.S. Co.*, 688 F.2d 1062, 1067 (1982); Trial Tr., 11/18/93, at 50. Respondent would not have suffered this very substantial disadvantage had the case not been erroneously removed in the first place.[7]

In noting these differences, respondent's point is not that what happened in federal court was fundamentally unfair or even reversible error under federal law (although he so argued below). But the fact remains that the federal and state courts and legislatures have made any number of different choices about the way in which judicial proceedings ought to be conducted, each of which is, on its own merits, entirely fair and reasonable. And the persons who select (or, in Kentucky, elect) the judges who exercise substantial discretion in the conduct of trials may have very different priorities regarding the characteristics that they seek out in prospective judges. Again, each set of choices is entirely just and reasonable, but they may produce very different results in the litigation and trial of cases.

Indeed, concern about local favoritism provides one of the biggest reasons why national defendants like petitioner and its amicus want to get out of state court and into federal court, and why, therefore, they base their briefs in cases like this on their sacred "right to remove a case." Pet'r Br. 18; Motion for Leave to File as Amicus Curiae, at ii. How petitioner can make that argument and then contend that it really makes no difference whether a trial is held in state or federal court, is baffling to say the least.

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[7] Trial in federal court also prevented respondent from using his allegations that petitioner had concealed evidence as a basis for a new tort claim of spoliation of evidence. Kentucky did not recognize this tort until 1995, *Reed v. Westinghouse Elec. Corp.*, No. 93-CA-2125-MR (Ky. App., March 10, 1995), *pub. withdrawn pend. rvw.*, No. 95-SC-549. Federal courts do not allow diversity plaintiffs to advocate untested legal theories of state law. *E.g.*, *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988).

And yet the reason why federal courts are of limited jurisdiction, and the reason why removal is strictly limited by statute and court decision, is that Congress and this Court have long recognized that both the crafting of litigation procedures and the selection of adjudicators to decide disputes involving their citizens represent key aspects of state sovereignty. It is, therefore, not a substantial objection to the reversal of a judgment that has been obtained by an erroneous removal that the federal judgment was not produced by rules or procedures that are inherently unfair.

There is also a very practical reason for rejecting petitioner's expressions of concern about avoiding repetition of litigation efforts if a fully-tried case can be relitigated in state court based on an early error with respect to removal jurisdiction. If a federal judgment loser does not think that there are substantial differences between state and federal procedures, he is scarcely likely to invest the time and resources needed to mount a second multi-day trial in state court. It makes little sense to argue that, in most cases where removal was improper but judgment was reached in federal court, there will be further proceedings in state court. The Court may rely upon the practicalities of litigation to prevent further proceedings in many such cases. For this reason as well, petitioner's argument based on the inefficiency of allowing retrial should be rejected.

Finally, it is doubtful that judicial efficiency is a sound basis for construing the removal statutes, which reflect a series of carefully crafted compromises between concerns of state sovereignty, which have led both Congress and this Court to severely restrict opportunities for removal of cases from the state courts, and a desire to allow certain groups of defendants to remove cases that were, at the time of removal, within federal jurisdiction. Such inefficiency, and a lack of prejudice, is surely entailed when a federal appeals court reverses a denial of remand that was based on procedural objections to the removal petition. It is hard to imagine how a plaintiff is "prejudiced" if, for example, a defendant removes within 31 instead of 30 days after receipt of the complaint. Moreover, as discussed above, adoption of petitioner's proposed rule allowing retroactive cure of jurisdictional flaws would introduce its own set of inefficiencies and paradoxes into the Congressional removal scheme, such as by encouraging defendants to file unsound notices of removal within the one-year limitations period in the hope that subsequent developments will validate the removal.

In summary, then, petitioner's contention that removal without jurisdiction, effected the day before the expiration of the one-year time limit for removal of diversity cases, may be validated by developments subsequent to removal that create complete diversity, even in the face of a clear objection from the plaintiff, is contrary to the language of the removal statutes, to this Court's longstanding construction of those statutes, and to the requirements of state sovereignty that undergird the limited availability of removal. Because jurisdiction was lacking at the time of removal, and respondent objected at that time, the decision below should be affirmed.

II. Because Title 28 and the Federal Rules Spell Out the Procedures and Time Limits that Plaintiffs Must Follow to Object to Removal Based on Lack of Jurisdiction, the Court Should Neither Legislate an Additional Hurdle for Litigants to Clear, Nor Impose on Appellate Courts the Burden of Entertaining Interlocutory Appeals Whenever a Case Is Removed Over the Plaintiff's Objection.

Petitioner also argues that respondent waived his objection to removal based on lack of jurisdiction at that time when he did not pursue the issue by seeking leave for an interlocutory appeal under 28 U.S.C. § 1292(b). From the perspective of a case in which judgment has been entered and

the Court faces the prospect of a retrial, petitioner's suggestion that "needless inefficiency" could have been avoided had respondent obtained interlocutory review of the denial of his motion to remand in 1990 has a superficial appeal.

There are, however, two compelling reasons why this suggestion should be rejected. First, the removal statutes and the Federal Rules of Civil Procedure spell out both the procedures that a plaintiff who opposes removal based on lack of jurisdiction must follow, and the times within which those actions must be taken in order to preserve the objection. Respondent complied with these requirements, and the Court should not legislate additional hurdles. Second, although requiring interlocutory appeals might reduce the small number of cases in which judgments are overturned based on erroneous decisions permitting removal, requiring such appeals in every case would make mandatory a form of appeal that is currently discretionary and highly disfavored, and would vastly increase the number of such appeals (including necessary pre-appeal rulings on permission to appeal), further burdening the already heavy dockets of the courts of appeals.

A. The first reason why petitioner's proposed waiver rule should be rejected is that it is contrary both to the removal statutes and to the Federal Rules of Civil Procedure. In effect, petitioner argues that, in addition to taking any other steps, a plaintiff who wishes to preserve an objection to removal must first seek a certification from the district judge that permits the order to be appealed, and then apply to the Court of Appeals for permission to appeal within ten days of the entry of the district court's order.

By contrast, in the 1988 amendments to section 1447, Congress specified the means by which objections to removal must be brought to the attention of the courts, and the times such objections must be raised, implicitly determining when each kind of objection would be waived if not asserted. Section 1447(c) specifies that objections based on removal procedures "must be made within 30 days after the filing of the notice of removal," implicitly providing that such objections are waived if not made within that time. On the other hand, the lack of subject matter jurisdiction requires a remand so long as "it appears" "at any time before final judgment." This provision notifies litigants that if the issue does not come to the district court's attention before judgment is entered, it may be waived, and implicitly assures them that, so long as they raise the issue before judgment, the issue has **not** been waived.

This statutory provision is reinforced by Rule 12(h) of the Federal Rules of Civil Procedure, which sets forth the means and deadlines by which various defenses must be raised. The 1966 Advisory Committee Notes make clear that, in conjunction with Rule 12(g), one function of these provisions is to specify the times and ways by which the itemized defenses are waived if not made. Under this rule, many defenses must be raised, on pain of waiver, within the time for filing an answer or motion under Rule 12, Rule 12(h)(1); almost every other defense may be raised throughout the proceeding under Rule 12(h)(2); and even after trial on the merits, the defense of lack of subject matter jurisdiction is not waived so long as it is brought to the attention of the court, "by suggestion of the parties or otherwise." Rule 12(h)(3). Yet petitioner makes no bones about the fact that its argument for a mandatory request for certification is tantamount to an additional requirement for the preservation of the defense of lack of subject matter jurisdiction.

This Court has been at pains to enforce the Federal Rules of Civil Procedure as written. *Leatherman v. Tarrant Cy. Narcotics Unit*, 113 S. Ct. 1160, 1163 (1993); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). Even if a change in procedure is desirable — and respondent shows below that requiring a section 1292(b) appeal is a very bad

idea — the Court has refused to adopt such new procedures through adjudication, preferring to follow the time-honored procedure of consideration by the Rules Committees with appropriate public notice and opportunity for comment, adoption by the Court under 28 U.S.C. § 2072, and ultimately review by Congress as the Rules Enabling Act provides.

Use of that procedure is particularly appropriate in light of recent amendments to 28 U.S.C. §§ 1292 and 2072 that not only authorize, but indeed encourage, this Court to adopt rules governing the finality of district court orders for purposes of appellate review. As respondent demonstrates in the next section of this brief, at 28-30, petitioner's argument, although clothed in the raiment of discretionary appeals under section 1292(b), would effectively transform rulings rejecting remand from interlocutory orders into final orders from which an appeal must be sought if they are to be appealed at all, before the remainder of the case proceeds. But, as the Court stated only recently in *Swint v. Chambers Cy. Com'n*, 115 S. Ct. 1203, 1211 (1995), "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." Thus, because no statute or Rule makes the rejection of removal rulings final, the right to appeal such a ruling after the final judgment in the case may not be denied on the ground that it should have been appealed when entered.

B. Petitioner's proposal that failure to pursue an appeal under section 1292(b) constitutes a waiver of the right to appeal should also be rejected because it would wholly transform such appeals from discretionary proceedings, which are used only in the exceptional case, and which most courts of appeals strongly discourage, into a routine and indeed mandatory mechanism for the litigation of removal questions on appeal. Although petitioner can cite some appellate authority to support its position, its petition acknowledged, at 17, that

the majority rule is to the contrary, and indeed this Court has not hesitated in the past to entertain appeals from final judgments pertaining to removability without the slightest hint that there had been an interlocutory appeal in the interim, let alone that one was required. *E.g. Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). In *Grubbs* itself, the Court decided whether removability had to be determined as of removal or as of judgment in the favor of petitioner Grubbs, even though, under petitioner's theory here, GECC had waived the issue by not pursuing an interlocutory appeal from the assumption of jurisdiction.[8]

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[8] Cases like *Sheeran v. General Elec. Co.*, 593 F.2d 93, 97 (9th Cir. 1979), *Gould v. Mutual Ins. Co. of New York*, 790 F.2d 769, 773-774 (9th Cir. 1986), and *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 341-342 (3d Cir. 1974), *cert. denied with three Justices dissenting*, 421 U.S. 937 (1975), present a different issue. In those cases, unlike here, the appeal in which removal was challenged was not the first because there had been a prior appeal from an interlocutory order or, in *Gould*, from a final judgment, in which the jurisdictional issue had not been raised. The propriety of jurisdiction may be considered in the course of interlocutory appeals under section 1292(a), *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940), and most courts apply the same principle to allow removal issues to be considered as well. *E.g., Humphrey v. Sequentia*, 58 F.3d 1238, 1240 n.2 (8th Cir. 1995). In that situation, it is arguable that issues of jurisdiction, because they must be addressed before consideration of the merits, are implicitly decided on the first appeal, and thus become law of the case. *See Little Earth of United Tribes v. HUD*, 807 F.2d 1433, 1438 (8th Cir. 1986) (law of case applies to issues decided only implicitly). Moreover, if there has been a previous appeal, requiring removal to be contested in that first appeal does not implicate the policies pertaining to discretionary appeals under section 1292(b), as this case does. However, the Ninth Circuit applied *Sheeran* and *Gould* to cases where there had been **no** prior appeal, and the Fourth Circuit followed suit, without noting the differences between the two kinds of cases.

This long-standing practice is well supported by reason and precedent. It follows, indeed, from the strong presumption that all trial court errors should be corrected by "a single appeal, to be deferred until final judgment has been entered." *Digital Equipment Corp. v. Desktop Direct*, 114 S. Ct. 1992, 1996 (1994). This presumption fully applies to claims that the case is being tried in the wrong forum. *Lauro Lines v. Chasser*, 490 U.S. 495, 500-501 (1989).

After all, although it may seem wasteful to retry a case if appeal is postponed until after judgment, it would be even more wasteful if every denial of a motion to remand not only may be the subject of an interlocutory appeal, but **must** be appealed in order to preserve the removal issue for review. Courts routinely warn that, to avoid piecemeal appeals, section 1292(b) may only be invoked in truly "exceptional" circumstances. *E.g.*, *Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972), *quoted with approval*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Most lower courts allow section 1292(b) appeals only if needed to avoid unusually protracted and expensive litigation, *e.g.*, *In Re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *mandamus considered on merits*, 688 F.2d 1297, *aff'd for lack of quorum*, 459 U.S. 1191 (1983), as indeed, the Judicial Conference contemplated when it promoted section 1292(b) in Congress. *See* 1958 U.S. Code Cong. & Admin. News 5260-5261. *Contra, Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702-703 (5th Cir. 1961). Indeed, the Sixth Circuit has specifically instructed that "[t]his statute was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days." *Kraus v. Board of Cy. Rd. Com'rs*, 364 F.2d 919, 922 (6th Cir. 1966), *recited in Wagner v. Burlington Indus.*, 423 F.2d 1319, 1322 n.5 (6th Cir. 1970). In light of this authority from the circuit where this case arose, petitioner's denunciation of respondent for failing to seek interlocutory certification that might have avoided a six-day trial, Br. 7, rings more than a little hollow.

Apart from the fact that section 1292(b) appeals may not be available in most removed cases under the Sixth Circuit's rule because their trials are not "big" enough to warrant exception to the general rule against interlocutory appeals, section 1292(b) contains several procedural and substantive requirements that impede use of this mechanism to appeal orders denying remand to state court. The district court must enter an order both stating its opinion that each of the three requirements is met, and explaining why. *Isra Fruit v. Agrexco Agr. Export Co.*, 804 F.2d 24, 25 (2d Cir. 1986). Thus, it must find not only that "an immediate appeal may materially advance the ultimate termination of the litigation," but also that the case "involves a controlling question of law" and that "there is substantial ground for difference of opinion" on that question of law. *White v. Nix*, 43 F.3d 374, 376-378 (8th Cir. 1994) (criteria not met just because there was little authority on point). Interlocutory appeal is considered undesirable where the legal issue is so intertwined with the specific facts of the case that it is better to pursue the matter along with the rest of the case after the final decision. *Spurlin v. General Motors Corp.*, 426 F.2d 294 (5th Cir. 1970). Some courts refuse certification unless resolution of the legal issue would affect a wide spectrum of cases. *E.g.*, *FDIC v. First Nat'l Bank of Waukesha*, 604 F. Supp. 616, 620 (E.D. Wis. 1985); *Graves v. First Nat'l Bank of Ga.*, 491 F. Supp. 280, 282 (D.S.C. 1980); *see also Parcel Tankers v. Formosa Plastics Corp.*, 764 F.2d 1153, 1155 (5th Cir. 1985) (revoking certification when it became clear that legal question was no longer of general importance); *but see Klinghoffer v. SNC Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (treating precedential importance of legal questions as just one factor that may support an immediate appeal).

Moreover, if the district court fails to certify its ruling for appeal, the matter is not reviewable in the court of appeals. *Leasco Data Processing Equip Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972); *see also Swint v. Chambers Cy. Com'n*, 115 S. Ct. 1203, 1210 (1995) (section 1292(b) **requires** a two-tiered system in which **both** district and appellate courts must approve the appeal). But if the district court does certify the appeal, the court of appeals may still exercise unreviewable discretion to refuse to consider the appeal for any reason, including the fact that its dockets are already too crowded. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). In exercising that discretion, the courts of appeals routinely take into account not only the impact that immediate review may have on the case before it, but also the long-range impact that allowing the appeal may have in breaking down the general rule against piecemeal appeals. *E.g., Link v. Mercedes-Benz of N. Am.*, 550 F.2d 860, 862-863 (3d Cir. 1977) (en banc).

For these reasons, it seems highly doubtful that this appeal would have been certifiable. As the appellate briefs make clear, the "legal" issues here were intertwined with the hotly-disputed particular facts of the case and some peculiarities of the structure imposed by Kentucky law on product liability actions of this sort. Petitioner could find only two district court cases to cite on its side of the issue, and it does not appear that the case involved questions on which there is a substantial difference of opinion. Indeed, the court of appeals directed that its opinion not be published, signaling its views that the jurisdictional issue was not of general interest, and this Court also concluded that the jurisdictional issue did not merit review.

It is even questionable whether certification of removal issues ordinarily will materially advance the termination of the litigation. It is true that, in the event a denial of remand is overturned, the case will be remanded to state court, but

that scarcely means that the litigation itself will be over. Even if the case proceeds to trial in federal court and thus must be remanded to state court after the appeals court decides that removal was improper, it is also quite possible, and indeed likely, especially in personal injury cases where money is the only issue, that the case will be settled or otherwise resolved short of trial in a way that will obviate the need for substantial proceedings in state court. Other cases will reach the court of appeals on some interlocutory issue (such as preliminary injunctions) or even a final decision short of trial (such as summary judgment), in which case the possibility of a section 1292(b) appeal is not needed to avoid the expenditure of trial resources.[9]

Respondent does not mean to suggest that removal cases are never appropriate for certification under section 1292(b), but only that it would be a mistake to proceed on the assumption that they are always certifiable. Given all of the obstacles that stand in the way of certification in such cases, it would be odd indeed to insist that certification be used as a gate keeper for appellate review of removal decisions after final judgment.

Most significant, if petitioner's rule is adopted, certification of removal cases will be transformed from the exceptional and highly permissive procedure that was contemplated by Congress in 1958, and that has been followed in the lower courts to date, into a mandatory procedure to be followed by

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[9] Because this Court has yet to address the standards that the lower courts should apply in deciding whether to certify and permit appeals under section 1292(b), it seems particularly unfair to penalize respondent for having failed to anticipate a reversal of the Sixth Circuit's reluctance to allow such appeals in personal injury cases like his. Indeed, it seems backwards for this Court to address for the first time on this petition the factors warranting such appeals, instead of in a case that directly raises that issue.

any plaintiff who objects to removal. Requests for certification may or may not lead to actual consideration on appeal. Yet in every removal case the district court would be faced with requests for certification, and whenever that was granted, the court of appeals would have to consider the question, adding considerably to appellate dockets that are already too large. Such consideration must occur not only on the merits, but at the permission to appeal stage, because the appeal cannot proceed absent an express order by a preliminary panel. And yet, as noted above, at 32, the crowding of appellate dockets has been accepted as a reason to deny permissive appeals under section 1292(b).

Moreover, petitioner's rule will require the litigation of many appellate cases on removal that would **never** have been before the courts of appeals if raising the issue after final judgment were sufficient, because many cases would likely have been settled, or otherwise disposed of on other grounds that would not have left the loser with the expectation that the outcome would have been different had the case been decided in state court. Indeed, the possibility that erroneous rulings may never have to be considered on appeal is one of the foundations of the strong presumption against piecemeal appeals. *Johnson v. Jones*, 115 S. Ct. 2151, 2154 (1995).

In this regard, it should be noted that although petitioner was careful to frame its question presented in narrow terms, concerning only whether failure to raise a jurisdictional issue under section 1292(b) waives that issue, there is no principled reason to confine the rule to jurisdictional cases, and indeed logic would compel the application of the rule to all removal cases. After all, if the case must ultimately be sent back to state court because removing defendants committed some lapse in removal procedure, such as omitting a necessary recitation in the notice of removal, or filing it too late, it is just as important to learn that in advance of trial as it is to learn of the need to remand for lack of jurisdiction

Indeed, because procedural issues are more easily waived under section 1447(c) and Rule 12(h) of the Federal Rules of Civil Procedure, *supra* at 26-27, it seems even more in keeping with the general policies governing the construction of the removal statutes to impose a rule of waiver by failure to seek immediate appeal in such cases than in cases involving jurisdiction to remove.

Admittedly, petitioner has not squarely addressed the question of whether the removal issue is preserved for appeal if the opponent of removal seeks certification but is denied that opportunity. Is the mere effort to appeal a denial of remand sufficient to preserve the issue, or does the failure of either the district court or court of appeals to grant appeal doom the objection to removal? In either case, the effort becomes mandatory. Moreover, if the mere effort does not preserve the issue, then district courts and courts of appeals will be under heavy pressure to certify and grant permission, respectively, for appeals of this nature in every case. Indeed, a rule giving courts broad discretion not to consider appeals pertaining to removal, such as for reasons of docket congestion, seems contrary to the cardinal principle that removal is disfavored and should be denied in close cases. *Cf. Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976) (removal may not be denied for reasons of docket congestion).

In the Ninth Circuit, only the effort is needed to preserve the issue, even if permission to appeal is denied. *O'Halloran v. University of Washington*, 856 F.2d 1375, 1378 and n.1 (1988); *cf. Able v. Upjohn Co.*, 829 F.2d 1330, 1334 (4th Cir. 1987) (if appeal is denied but propriety of removal was doubtful, later appeal would be examined "in light of that fact"). Because most appeals will not be allowed, the requirement becomes merely an empty ritual, that will require the litigants to file more paper, thereby giving at least the district court and perhaps the court of appeals one

extra matter to consider (or two, if the case would have gone away before judgment), and little more.

In summary, although from the perspective of a case where remand has been ordered after trial, petitioner's rule requiring interlocutory appeal may seem attractive, adoption of that rule or anything comparable would have deleterious effects on other important jurisdictional and removal policies, as well as being contrary to the letter and the spirit of the statutes and rules. Accordingly, respondent should not be held to have waived his objections to removal by his failure to seek or obtain an interlocutory appeal under 28 U.S.C. § 1292(b).

CONCLUSION

The decision of the court of appeals should be affirmed.

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